

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALYSON HERFERT, TALANA WILEY,)	
SHANNON GORDNER, KATHRYN DE)	
PEUTER, BECKY KUHL, ALANNA)	No. 2:11-cv-1301-JCC
WASKO, and DENIZ ZOELLER, on behalf of)	
themselves and all others similarly situated,)	JOINT OPPOSITION TO OBJECTOR
)	PEDERSON'S MOTION TO STAY
Plaintiffs,)	POSTING OF APPEAL BOND AND
)	RELATED DISCOVERY
v.)	
)	NOTE ON MOTION CALENDAR:
CRAYOLA LLC,)	AUGUST 24, 2012
)	
Defendant.)	
)	

I. INTRODUCTION

Objector Amber Pederson's Motion to Stay Posting of Appeal Bond (Dkt. 68) is based on a misreading of this Court's reasoning when it set the amount of the appeal bond. The Objector concedes that a bond of up to \$3,000 would be justified (Dkt. 68 at 4). Objector argues, however, that the bond amount is improper because it is based "on an inclusion of attorneys' fees for the appellees." (Dkt. 68 at 3). But the Court did not only consider attorney's fees in setting the bond amount, relying instead on the factors routinely used by courts in this Circuit. *See* Tr. of July 31, 2012, Hearing at 6:2-9 (Court explaining factors relied on in determining bond amount). Because

1 the factors this Court employed are well-accepted in this Circuit, any review of the amount of the
 2 bond would be for abuse of discretion. This Court, applying well-accepted factors, used its
 3 discretion to set a bond of \$20,000. Given the deferential standard of review and the Court's
 4 careful analysis, Objector is unlikely to prevail on appeal. The stay should be denied.¹

5 II. ARGUMENT

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 7 Federal Rule of Appellate Procedure 7 provides that "the district court may require an
 8 appellant to file a bond or provide other security in any form and amount necessary to ensure
 9 payment of costs on appeal." Fed. R. App. 7. The Advisory Committee Notes to the Rule
 10 indicate that it leaves "the question of the need for a bond for costs and its amount in the
 11 discretion of the [district] court." Fed. R. App. 7, Adv. Comm. Notes. *Accord Azizian v.*
 12 *Federated Dep't Stores, Inc.*, 499 F.3d 950, 955 (9th Cir. 2007) (stating that the amount of bond
 13 is reviewed on appeal for abuse of discretion).

14
 15 Courts in the Ninth Circuit look to four factors to determine whether a bond is necessary
 16 and the amount of the bond: (1) the merits of the appeal; (2) whether the appellant has shown any
 17 bad faith or vexatious conduct; (3) the appellants' financial ability to post a bond; and (4) the risk
 18 that the appellant will not pay the appellees' costs of an unsuccessful appeal. *In re Wells Fargo*
 19 *Loan Processor Overtime Pay Litig.*, No. 07-1841, 2011 WL 3352460, at *10 (N.D. Cal. Aug. 2,
 20 2011) (applying factors and setting bond at \$20,000 if objector were to appeal).

21
 22 This Court analyzed these factors in setting the bond amount; the Court never mentioned
 23 attorney's fees. Dkts. 67 & 71 (Minute Order on appeal bond); Dkt. 70 (notice of filing of
 24

25
 26 ¹ This Court may also deny the Motion to Stay because, after Darrell Palmer's pro hac vice application was revoked,
 there is no valid signature on that motion. *See* Dkt. 68 at 7 (listing Palmer as sole signatory) *and* Fed. R. Civ. P.
 11(a) (the "court must strike an unsigned paper unless the omission is promptly corrected after being called to the
 attorney's or party's attention").

Official Transcript); Tr. of July 31 Hearing at 6:2-9. “After considering the factors that are suggested by the Ninth Circuit,” this Court found on the record that:

- “Ms. Pederson is the only objector out of millions of claimants”
- “the appeal appears to be vexatious and frivolous”
- “there is a serious risk that Ms. Pederson will not be available to pay any costs in the event she loses an appeal,” and
- “the apparent ability of her attorney to post bond” favors the \$20,000 amount.

Tr. of Jul 31 Hearing at 6:2-9.² These findings are plainly supported by the record.

First, Objector Pederson is, as the Court found, the only objector, although millions of units of Washable Colored Bubbles were distributed.

Second, the appeal is vexatious and frivolous. After all, what more could Objector Pederson want from the Settlement in which her claim is valued at *most* \$15, *Id.* at 5: 15-20, and which already provides for money back; compensation for any property damage; review of claims by a neutral third party in the event of a claimant’s dissatisfaction; and changes to the product and marketing to protect consumers? Moreover, there is no limit to the number of claimants who can take advantage of these benefits. Despite this extraordinary relief, Class Counsel’s attorney’s fees are less than their lodestar.

In contrast, Courts have routinely found that Objector’s counsel have laid in wait for large class action settlements to be approved, then suddenly appear on behalf of “pro se” objectors at the appeal stage, hoping that the parties will buy them off to allow the settlement to go forward without the delay of appeal. *See* Ex. 3 to Dkt. 57 (detailing abandoned appeals,

² Mr. Palmer has not indicated he will withdraw as counsel for the appeal in the Ninth Circuit, and thus his ability to pay is still relevant.

1 frivolous appeals, and high bond amounts required of Objector's counsel) and Ex. 1 to Dkt. 62
2 (same). This appeal, like so many others pursued by Objector's counsel, appears vexatious and
3 frivolous.

4 Third, as Objector Pederson conceded in her Opposition to the Motion for Appeals Bond
5 (Dkt. 60 at 3), there is a serious risk that Objector Pederson will not pay costs. Not only is she
6 from another district, but her counsel's lack of candor (including in his pro hac vice application)
7 is further cause for concern that costs will not be paid. *See* Dkt. 74 (denying application of
8 Darrell Palmer for admission pro hac vice). The parties also note the unanswered question of
9 whether the objector was really pro se at the time of her original objection or whether she was
10 always represented by Mr. Bandas (one of the three law firms that now represent her).

11 Finally, Objector cites to no authority that a court may not consider the ability of counsel
12 to post bond. Indeed, courts in this circuit have considered the ability of counsel to post the
13 appeal bond. *See In re Wal-Mart Wage & Hour Employment Practices Litig.*, MDL 1735, 2010
14 WL 786513 (D. Nev. Mar. 8, 2010) (requiring \$500,000 bond "through attorneys").

15 Objector Pederson's arguments that she will suffer irreparable injury and the bond will
16 damage the public interest are disingenuous and exaggerated. Objector's counsel file many
17 appeals on behalf of objectors each year, hoping to extract money from parties. Dkts. 57 and 62
18 (attaching charts of counsel's numerous appeals). Given this apparently lucrative practice,
19 previous bonds many times the size of the bond here have not chilled their behavior. And if
20 Objector's counsel truly believes in the merits of their appeal, they know they will get the money
21 back because they will be the prevailing party on appeal.

III. CONCLUSION

For the reasons stated above, the request to stay the appeal bond should be denied.

DATED this 20th day of August, 2012.

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CERTIFICATE OF SERVICE

I certify that on August 20, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 20th day of August, 2012.

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